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PROVISIONS IN AUTOMOBILE POLICIES AGAINST RENTING AND USE FOR HIRE

Under the provisons of a Missouri statute that a warranty in a policy of insurance which is not material to the risk, shall be considered merely a representation, it was held that a policy insuring an automobile against fire and containing a warranty that the machine would not be used for hire, was not forfeited by the machine being used for hire on one or two occasions, it not being used for hire at the time it was burned. As applied to the loss, the provision referred to was not a warranty and was not material to the risk. This case follows the rule established by other Missouri cases, that, "Temporary non-compliance with provisions of the policy, unless such provision is a warranty, will not work a forfeiture, if there was compliance at the time of the loss (Berryman v. Maryland Motor Car Ins. Co., 199 Mo. App. 503, 204 S. W. 738 [1918]).

In North Carolina, the rule is laid down that in construing a policy of automobile fire insurance, with express provision that the automobile "will not be rented or used for passenger service of any kind for hire except by special consent of the company indorsed on the policy," a single act of renting or using the car for hire, by an employee of the owner without his knowledge, will not be held in itself to be such a breach of the owner's warranty as will forfeit the insurance. In this case the owner was suing on a policy of the kind mentioned to recover for the loss of his car, which had been burned. Immediatey before the loss his employee, without his knowledge, had used the car for hire to others, but the loss occurred thereafter, and while the car was being returned, after some repairs were made on it, to the owner's garage under his directions. There was no evidence that the outward trip had any direct bearing upon the loss, or increased the risk at the time of the loss. It was held that the loss did not fall within the intent and meaning of the prohibitive clause of the policy so as to work a forfeiture. It will be noted that the Court seems to have treated this provision as a warranty, although allowing the insured to recover (Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917 D 50 [1915]).

A clause in an automobile insurance policy provided that, "It is warranted by the insured that the automobile hereby insured, during the term of this policy, shall not be used for carrying passengers for compensation, and that it shall not be rented or leased." It was held that this constituted a promissory, as distinguished from an affirmative, warranty, an unjustified breach of which by the insured prevents recovery, without regard to whether the prohibitive use increased the risk. The Court defines an affirmative warranty as one that affirms the existence of certain facts at the time of the insurance, and a promissory warranty is one requiring the performance or the omission of certain things after taking out the insurance (Orient Ins. Co. v. Van Zandt-Bruce Drug Co., 50 Okla. 558, 151 Pac. 323 [1915]).

In Texas it has been held that the clause, "that the automobile hereby insured during the term of this policy shall not be used for carrying passengers for compensation," etc., was intended to mean that the automobile should not be continuously used for that purpose for any length of time, or, in other words, the owner should not make a business of using said automobile for carrying passengers for hire, and it was evidently never contemplated that the casual use of it would work a forfeiture of the policy. Accordingly, use of the machine by the owner's son, without

the owner's knowledge, on two or three afternoons during a fair, for carrying passengers for hire to and from the fair grounds, did not work a forfeiture of the policy. This clause in the policy stated that it was a warranty, and contained a provision that violation of any warranty in the policy rendered the policy immediately null and void. However, according to the construction of the clause by the Court, there was no violation of the provision. Consequently, whether or not the provision amounted to a warranty, was a question not necessary to be decided (Commercial Union Assur. Co. v. Hill, Tex. Civ. App., 167 S. W. 1095 [1914]).

A provision of this kind in an automobile fire insurance policy, issued to the mortgagor and mortgagee of the machine, as their respective interests might appear, applies to both the mortgagor and mortgagee, and where the car was used mainly, if not entirely, for livery purposes by the mortgagor, there could be no recovery under the policy (Marmon Chicago Co. v. Heath, 205 Ill. App. 605 [1917]).

In an action to recover on a policy insuring an automobile against loss or damage by fire, which policy contained a provision warranting that the automobile would not be used for carrying passengers for hire or be leased and that, if the warranty were violated, the policy would "immediately become null and void," it appeared that six months after the policy was issued the owner permitted his son to use the automobile to carry passengers for hire. It was held that the policy at once ceased to be in force upon such use of the car, and that the owner could not recover upon it for damage to the automobile by fire occurring eleven and a half months after it was issued. It was further held that the owner was not entitled to a return of any premium paid on the policy, as the policy had attached and only by his own act was he deprived of its full benefit (Elder v. Federal Ins. Co., 213 Mass. 389, 100 N. E. 655 [1913]).

At the time this case was decided, and during all the time in question, there was a statute in force in Massachusetts providing as follows: "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss." The Court held that, "having been inserted in the body of the policy, the warranty was not dependent upon the negotiations embodied in the application and final issuance of the contract of insurance," and that, accordingly, the statute quoted was inapplicable.

MUNICIPALITY CANNOT BE LIBELED

Mr. Charles J. Dolan, in an article appearing in the Central Law Journal for May 20, 1923 (96 C. L. J. 168), discusssed the case of City of Chicago v. The Tribune Co. (307 Ill. 595). From this case we learn that one may with impunity publish false and malicious statements regarding a municipality with intent to destroy its credit and financial standing. The only limitation to which the press is subjected, is stated by the Court thus: "Where any person, by speech or writing, seeks to persuade others to violate existing law or to overthrow, by force or other unlawful means, the existing government, he may be punished, but all other utterances or publications against the government must be considered absolutely privileged."

In the case mentioned, which was decided on demurrer to the declaration, the criticism was more than mere criticism of the officials in office. It was partly directed at the corporate entity, which the Court

holds is utterly without recourse in such case.

The Court has much to say about "freedom of speech," but we fail to understand why that question is involved in this case any more than it is in any other case of libel.

The opinion of the Court is unsatisfactory and unconvincing.

NOTES OF IMPORTANT DECISIONS

THE OBLIGATION TO ACCEPT A CUSTOMER.—Mr. Justice Bailhache's decision in Western Bank, Limited, v. Ernest Beck & Co. Limited, has just been affirmed by a strong Court of Appeal consisting of Bankes, Scrutton and Younger, JJ., Times, 28th ult. The defendant company had sold a quantity of cloth to the plaintiff bank, but had undertaken, as a term of the sale, to endeavor to sell it on commission for the plaintiffs, and if they could not do so, after a certain lapse of time, to repurchase it from the bank on certain agreed terms. The company received an offer for the cloth from the Krassin Delegation, then in England, but the bank would not have any dealings with Bolsheviks. The defendants refused to repurchase the cloth at the expiry of the agreed time on the ground that the plaintiff bank had unreasonably refused a customer tendered by them as agents, and had therefore prevented the carrying out of a sale. It was shown, however, that a private person called Paley had also offered to purchsae the cloth, and that the bank had refused to accept him because he admitted that he intended to re-sell to the Krassin Delegation. Mr. Justice Bailhache held that the bank was entitled to refuse the Krassin Delegation, an impecunious customer, but was not entitled to refuse Paley, whose financial stability no one doubted, merely on the political ground that he was going to re-sell to the Delegation. The bank had, therefore, unreasonably prevented the agent from earning his commission, and must be held liable in damages accordingly. —Solicitors' Journal (Eng.), April 7, 1923.

POWERS OF FEDERAL TRADE COMMISSION.—The powers of the Trade Commission are limited to matters directly relevant to interstate commerce, so that the corporation under investigation must not only be engaged in such commerce; but the subject under investigation must be so related to interstate commerce that its regulation may be accomplished by an act of Congress, or so interwoven with interstate commerce that the whole subject is necessarily brought within the jurisdiction of Congress. The manufacture or production of goods is not "commerce", but where manufacture and production are a part of, and essential to, the operation of an instrumentality of interstate commerce, they may be so intimately associated with the instrumentality itself as to be an accessory thereto, whose regulation is necessary to insure regulation of the instrumentality.

Where corporations maintained manufacturing plants in a single state, but purchased their raw materials or produced them at points without the state, and had them shipped by interstate carriers to their plants, and then sold the manufactured product in interstate commerce, the intrastate portion of the business was separable from the interstate so as not to be subject to regulation by Congress.

The Federal Trade Commission is not invested by Federal Trade Commission Act, § 6, empowering it to gather and compile information concerning corporations engaged in commerce, etc., with authority to inquire into any business of nation-wide extent, and has no visitatorial powers coextensive with the constitutional functions of Congress; but its activities are strictly limited to the field of interstate commerce, outside of the portions of that field occupied by the act to regulate commerce and the Federal Reserve Act.—Federal Trade Commission v. Claire Furnace Co., 285 Fed. 936.

NATIONAL PROHIBITION ACT REPEALED REVENUE STATUTES RELATING TO INTOXICATING LIQUORS.—The National Prohibition Act repealed Rev. St. § 3258 (Comp. St. § 5994), imposing a penalty for possessing a still without having registered it, section 3282 (Comp. St. § 6022), imposing a penalty for manufacturing a mash fit for distilling on premises not an authorized distillery, and section 3242 (Comp. St. § 5965), imposing a penalty for carrying on the business of a rectifier or liquor dealer without having paid the special tax.—United States v. Stafoff, 43 Sup. Ct. 197.

RECENT DECISIONS IN THE BRITISH COURTS

An important state law judgment was given in Duff Development Co. (Lim.) v. The Government of Kelantan and others, in which the crucial point involved was whether certain debts owing to the Government of Kelantan by the Crown Agents for the Colonies could be

garnisheed at the instance of the plaintiffs, who were creditors of the Kelantan Government in respect of a considerable sum due to them, as costs of an arbitration with that government. The government had submitted itself to the arbitration and had accepted the award, and it was, therefore, maintained by the plaintiffs that this involved a submission for all purposes by the government to the courts of this country, but Russell, J., overruled this contention, holding that the submission to arbitration did not preclude Kelantan from invoking the principle of international comity, whereby the courts decline to exercise their jurisdiction over the property of a sovereign State in this country; and the learned Judge found that the Government of Kelantan was in fact a sovereign State on the evidence furnished by a letter from the Foreign Office certifying to that effect. This judgment has been affirmed on the plaintiffs' appeal to the Court of Appeal, but with expressions of doubt and regret which justify the expectation that it will not be allowed to stand without a further appeal to the ultimate tribunal of appeal.

Another application of the rule in Rylands v. Fletcher was made in Hoare & Co. (Lim. v. McAlpine & Sons in which the plaintiffs, lessees of an old hotel at the corner of Fish Street Hill, in the city, sought an injunction to restrain the defendants, a firm of building contractors, from carrying out works on the site of a proposed new building on the opposite side of the street, so as to cause injury by subsidence, vibration or loss of support to their premises, and they also claimed damages; and Mr. Justice Astbury, finding that the driving of piles which was necessary for the construction of the defendants' proposed great building had caused the structural injury complained of, dismissed the defendants' contention that in view of the old condition of the plaintiffs' hotel they were not responsible for the damage so caused. He preferred to apply the principle of the leading case on the ground that the defendants had let loose a force which got beyond their control, the condition of the property affected having nothing to do with the plaintiffs' resulting right.

Partnership and company matters have lately furnished one or two notable decisions. The House of Lords overruled the judgments both of the Court of Appeal and of the Judge of the first instance in Cruickshank and others v. Sutherland and others on a partnership question which, on the face of it, was of a very elementary character, but which evidently, from the difference of judicial opinions, involved serious legal difficulties. A member of a firm, whose partnership articles provided that the share of a partner dying or retiring was to be ascertained by reference to the last annual account, died, and the question was whether the value of his share in the partnership assets was to be taken at the value at which it was put in the last annual account or at its actual market value at the date of his death. Both the Courts below took the former view, but the Lords held unanimously that the assets must be taken at their actual value; and it will be interesting to read the grounds for this rather startling result when the judgments are reported at length.

A curious dispute arising out of the depreciation in foreign currencies was dealt with in In Re British-American Continental Bank (Lim.); Lesser and Rosencrantz's Claim which was a summons taken out in the winding up of the Bank by L. and R., a German firm, asking for a declaration that they were entitled to prove for a sum of 20,138 l. for damages for a breach of contract on December 31, 1920, that sum representing the value at the rate of exchange on January 25, 1921 (the date of the winding-up order, of 4,339,919 German marks which were expended by the applicants on that date in purchasing certain currencies contracted by the bank to be delivered on December 31, 1920, but which the bank having failed to do so, the applicants purchased to meet their obligations and minimize their loss. The proof was lodged by L. & R. at the request of the liquidator in May, 1921, and subsequently dividends amounting in the aggregate to 7s. 11d. in the l. were declared in the winding-up, but no dividends were paid to L. & R. on their claim, and, the mark having greatly depreciated, the liquidator on December 20, 1921, obtained leave on an ex parte application under Sec. 214 of the Companies Act, 1908, to purchase out of the bank's assets such an amount as would be sufficient to pay to L. & R. the full amount of their original claim (4,339,919 marks), with interest in satisfaction of the liability. The requisite marks were bought for about 5,423 l., and were tendered by the liquidator to L. & R. at Hamburg, but were refused by them, and they insisted on their right to the dividends on their claim in English currency. P. O. Lawrence, J., held (following another decision against the same bank, In re Golozieher and Perso's Claim (1922) 91 L. J., Ch. 160) that the amount of the damages sustained by the applicants by the breach of the contract must be determined on the date of the breach, and as those damages had, in the first instance, to be assessed in foreign currency, the correct date for their

conversion into English money for the purpose of ascertaining the amount due at the time of the winding-up order was the date of the breach, December 31, 1920. The applicants were not bound to accept the tender of German marks made by the liquidator on January 5, 1922, as the marks then tendered did not represent the full amount of the damages for which they were entitled to be admitted as creditors in the winding-up; and so, in the result, it was declared that the applicants were entitled to be admitted as creditors in the winding up for such an amount as represented the 4,339,919 marks converted into English money at the rate of exchange ruling on December 31, 1920, and to receive the dividends already declared, and thereafter to be declared on that amount.

A riot damages case before Swift, J. (Pitchers v. Surrey County Council, ibid), raised some interesting points. The claim arose out of the Canadian mutiny at Whitley Camp, in the course of which the plaintiff's shop in the camp area was wrecked, and it was contended by the local authority that no compensation was payable by them under the Riot (Damages Act, 1886, because (a) the camp was under military control, and not under that of the Surrey Police, and (b) the damage had been caused during a "riot" and not a "mutiny." The learned judge found, however, that the fact that the damage was done by soldiers under circumstances which might amount to a mutiny did not prevent the disturbance from being a riot; that there was nothing to prevent a riot occurring in a private place (the camp area); and that it could not be said that the police were not in control of the place, even though it might have been physically impossible for them to quell the disturbance.

In contract there were several cases of outstanding importance. The House of Lords decided, but by a majority only (Lord Sumner dissenting, that the use of the word "etcetra" at the end of an exemption clause in a charter-party specifying a number of particular causes over which the charterers might have no control, was sufficient to cover a strike of dock laborers preventing loading of the vessel, the doctrine of ejusdem generis not applying where, as in this case, the general words came first, and the particular words, used as examples, followed (Ambatielos v. Jurgens).

A novel question of principle was decided by the same tribunal in a case of sale of goods (British & Bennington's (Lim.) v. N. W. Cuchar Tea Co., ibid 426), in which the purchasers had repudiated the contract on the ground that delay in delivery caused by orders of the Shipping Controller directing the vessels containing the goods (tea) to other ports, amounted to a frustration of the commercial adventure, the award of the arbitrator to whom the dispute was referred in favor of the vendors being upheld on the ground that "when the purchaser has repudiated a contract of sale, the onus is not on the vendor, in order to recover damages, to prove that he was ready and willing to deliver the goods in accordance with the terms of the contract."

In matters of Tort there were also a number of interesting decisions. The House of Lords held in Fairman v. Perpetual Investment Building Society—a claim by a lodger against the owner of a block of flats for injuries caused by the defective condition of the common staircase—that, there being nothing in this case in the nature of a "trap," and there being no contractual relation between the lodger and the landlords, the duty of the landlord did not involve a guarantee of the safety of the building, nor an obligation to keep it in repair, and that an obvious defect which on the face of it showed to any reasonable person that there was danger, did not give rise to any liability on the part of the landlord. Another negligence question of a different and novel character was decided by McCardie J., in Hawes v. Williams, where the action was by guests against their host, who took them out for a motor-car ride which ended in a collision, claiming damages for the negligent driving of the car. The contention for the defense was that a host is only liable to take such care of his guests as he would take of himself, a standard of care which the learned judge declined to accept, as being a standard of individual care resting upon personal idiosyncrasy, with the result that, in a finding by the jury of a want of "reasonable care," judgment was entered for the plaintiffs, and to conclude there may be noted the cases of two married women's torts, Edwards v. Porter before Bailhache, J., and McNeall v. Hawes before Lush, J., in which in each case, money had been fraudulently obtained by the defendant's wife, and the question to be decided was whether the wife's fraudulent representation was merely parcel of the making of a contract which the wife was legally incapable of contracting, or was an independent or naked tort for which, alone, the husband would be liable. Bailhache, J., decided in the case before him that there was no independent tort, so that the husband was exempt from liability; but Lush, J., came to a contrary view in the second case though the facts were very similar and it is left to the appellate tribunal to determine the doubtful point.

DONALD MACKAY.

Glasgow, Scotland.

ANTI-TRUST LAWS A PROTECTION TO MONOPOLY

By Edgar Watkins

Between the tyranny of an autocracy, whether enforced by an emperor, a class or a dominant electorate, and the extreme of individualism, which is anarchy, lies liberty. The impulse of mankind is towards liberty, which to some means unrestrained license. Liberty, however, in its true sense, means the right to do only those things the doing of which infringes on no other man's rights.

Liberty thus delimited applies to all social activities, and among these activities, especially with English-speaking peoples, liberty of contract has always been highly cherished. Says Mr. Justice White:[1]

> "Freedom to contract and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law."

Liberty of contract does not and should not mean the right to make all contracts. That all may enjoy liberty to contract, some contracts must be prohibited. Thus contracts unduly restraining trade may properly be prohibited in order that another's freedom to contract shall not be destroyed. This principle is an essential part of our common law.

In England kings granted the exclusive right to one or a specified class to deal in a named commodity or commodities. This was called a monopoly,[2] and by such grants others than the monopolist were restricted in their liberty to contract.

By a natural transition monopoly came to be applied to the effect rather than to the grant. This is stated with his usual force and with a clearness more than usual, by Chief Justice White as follows:[3]

> "In this country also the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced."

It is in this secondary sense that the word "monopoly" is used in our anti-trust laws.

The ruthless way by which large aggregations of capital sought to obtain that monopoly which gave power to restrain trade aroused the fears of the American people, ever jealous of this freedom to contract, and public opinions demanded prohibitory statutes. The first result was the Sherman Act of 1890, followed by the Elkins Amendment of 1903 to the Act to Regulate Commerce. The Elkins Amendment[4] prohibited railroads from rebating their charges to favored shippers and thus properly prevented one of the means used by aggregations of capital in building up a monopoly.

The evil sought to be prevented by the Sherman Anti-Trust Law was old, the statutory description and the prohibition of the causes of the evil and the remedies provided extend the common law. The Clayton Act[5] and the Federal Trade Commission Act[6] passed in 1914 are largely supplementary of the Sherman Act, although construction of the Federal Trade Commission Act, as later herein shown, gives the words "unfair methods of competition" prohibited thereby a broader meaning than such words had at common law.

(1) Standard Oil Co. v. United States, 221 U. S. 1, 56; 55 L. Ed. 619, 643; 31 Sup. Ct. 502, 34 L. R. A. N. S. 834; Ann. Cas. 1912D. 734; 4 Fed. Anti-trust Dec. 79.

(2) For the original meaning of the word "monopoly," see Coke, 3 Inst. 181; Hawkins P. C. bk. 1, chap. 79.

(3) Note 1. supra.

(4) Act Feb. 19, 1903, chap. 708, 32 Stat. 847; Watkins' Shippers & Carriers 3rd. Ed., sections 371, 372.

(5) 38 Stat. 730 (1914) Watkins Op. Cit. p. 1310 seq.

(6) 38 Stat. 717 (1914). Watkins Op. Cit. p. 1410 seq.

Has the public benefited from these laws? Seeking an answer to this question it is perhaps necessary separately to consider the anti-trust laws and the Federal Trade Commission Act.

Within the limits of this paper it is impossible to make reference to the many decisions arising out of the anti-trust laws, nor is a discussion of all such necessary in order to answer the question propounded above. A few cases typical and important show what have been the results. Perhaps the Standard Oil and Tobacco Cases[7] in the extent of the business affected, in the learning displayed in the opinions and in the lack of results obtained are fairly representative and fully convincing of the futility of injunction and dissolution suits under these Federal Statutes. Although the "rule of reason" applied in these cases resulted in limiting the statutes contrary to the government's contention, it was a famous victory. Notwithstanding this victory the convicted trusts were not injured nor was there perceptible any public benefit. The separated corporate congeners demonstrated that all the parts were more valuable than the whole and profits increased.

The government won in the freight association cases,[8] but freight associations continued to function because necessity was stronger than the Supreme Court's decisions. Perhaps there were added difficulties in agreeing on rates; and in the Central Yellow Pine and Tift cases, the decisions were so far effective as to create a burden of proof on the carriers, a burden later made statutory.

The victory for the government in the Northern Securities Company case[9] merely prevented what Transportation Act 1920[10] seeks to compel. In the Steel Trust case[11] the justices did not agree on all points, but all agreed, as stated in the dissenting opinion, that the anti-trust law "offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it."

Illustrating the situation resulting from these leading cases: One aggregation of capital has the right to sell or refuse to sell to whom it pleases. Thus the Tobacco Trust, the Steel Trust, or other large business controlling certain commodities or certain well-known brands, can say to an individual or a class that sales will not be made to them; the reason, whether stated or not, being that the buyer deals in competitive goods. An association of buyers, however, cannot say in co-operation that its members will not buy from the trust except on the condition that such members also be permitted to buy other and competing goods. One trust has greater rights than two thousand individuals jointly controlling an equal amount of business. An association whose members deal in lumber cannot do what can be done by one steel corporation, with greater power to control markets, and which does a business larger than the aggregate of the business of such members.[12]

While criminal prosecutions have been few, some convictions have been had under the criminal provisions of the statute.

(7) Note 1 supra and United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632, 4 Fed. Anti-trust Dec. 168.

(8) Joint Traffic Assn. Case, 171 U. S. 505, 569, 571, 577, 43 L. Ed. 259, 287, 288, 290. 19 Sup. Ct. Rep. 25; 1 Fed. Anti-trust Dec. 869; U. S. v. Trans-Missouri Freihgt Assn., 166 U. S. 341, 41 L. Ed. 1027, 17 Sup. Ct. Rep. 540. See recent case of Hoegh v. R. R., 43 Sup. Ct. Rep. 47.

(9) Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436, 2 Fed. Anti-trust Dec. 338. See related decisions 134 Fed. 331, 67 C. C. A. 245, 2 Fed. Anti-trust Dec. 618; 120 Fed. 721, 2 Fed. Anti-trust Dec. 215.

10) Watkins Op. Cit. Sec. 63-A.

(11) United States v. United States Steel Corp. 251 U. S. 417, 64 L. Ed. 343. 40 Sup. Ct. 293.

(12) Eastern States Retail Lumber Dealers Assn. v. United States, 334 U. S. 600, 58 L. Ed. 1490, L. R. A. 1915A, 788, 34 Sup. Ct. 951. American Column & Lumber Co. v. United States, 257 U. S. 377, 66 L. Ed. ——, 42 Sup. Ct. Comp. Steel Case Note 11, supra.

Grand juries are not now inclined to indict under this statute and prosecutions are now rare. The Nash case[13] is typical of the criminal cases. There a conviction in the District Court was reversed because of an erroneous charge. However, the Supreme Court held that notwithstanding the rule of reason which inserted the indefinite term "unduly" as descriptive of unlawful restraints, the statute was sufficiently definite to support a conviction. The restatement of the rule of reason in this case more clearly gives that rule than the larger discussion in the Standard Oil and Tobacco cases. The restatement by that great master of forcible English, Mr. Justice Holmes, after citing cases, follows:

> "Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting the course of trade."

On retrial Nash and his co-defendants were promptly acquitted.

Naval stores, the commodities involved in the so-called trust out of which grew the Nash case, were sold no cheaper as the result of this prosecution and the business of production was greatly injured. The American Naval Stores Company, the company involved by the acts of Nash, failed. Giving the result of the criminal and civil prosecutions in this case, one familiar with the facts and in every way capable of accurately and fairly judging the results, writes:

> "There is no doubt of the fact that the failure of this company was a very great blow to the turpentine industry in Georgia and Florida, and particularly to the producers. The company had stood between the producers and consumers of naval stores, such as the soap men, and had been able to keep up the price. Upon the failure of the company the price went to pieces and I happen to know that the producers and others who had been very much opposed to the company deeply regretted its failure. The results were extremely bad."

In the Duplex Printing Press case,[14] the right, notwithstanding the exceptions of the Clayton Act, to restrain strikers was sustained. All that was here done could have been done under the common law. The decision is important and unquestionably shows that labor as well as associations of traders may be prevented from all undue restraints of trade. "Peaceable" restraint is held unlawful in language as follows:

> "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute."

As to the claim that Section 20 of the Clayton Act exempted labor unions, the Court said:

> "It must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the Anti-trust Laws—a restriction in the nature of a speeal privilege or immunity to a particular class, with corresponding detriment to the general public."

Probably the most comprehensive injunction order ever issued in strike cases was that in a case brought by the Attorney

(13) Nash v. United States, 229 U. S. 373, 376; 57 L. Ed. 1232, 1235; 33 Sup. Ct. 780. It would seem that he rule of the Nash case is somewhat at least limited by the decision in the Lever Act cases, United States v. Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516, 14 A. L. R. 1045, 41 Sup. Ct. 298, and Oglesby Grocery Co. v. United States, 255 U. S. 108, 65 L. Ed. 535. The able opinion of District Judge Sibley in the Oglesby case was based entirely on the Nash case, 264 Fed. 691.

(14) Duplex Printing Press Co. v. Dearing, 254 U. S. 443, 65 L. Ed. 349, 41 Sup. Ct. 172.

General to restrain railroad strikers.[15] In this case District Judge Wilkerson discussed the authorities ably and exhaustively.

In the case of United States v. Swift & Company et al.,[16] the Supreme Court of the District of Columbia approved a consent decree enjoining the five largest packers from monopolizing or tending to monopolize the business of dealing in food commodities other than meats, and required the defendants to quit the business of dealing in such unrelated commodities. This decree, subsequently confirmed by Justices Stafford and Bailey, unquestionably has done good and forestalled what was rapidly becoming a dangerous monopoly. Similar consent decrees have been entered in other cases. Judge Knox, in New York, by consent of the parties, recently dissolved the Gypsum Industries Association. "Washington officials" are quoted in the press as expressing the hope that the decree in this case "may point the way to other branches of industry and commerce * * * to obtain the unquestioned advantage of co-operation without running undue risk of violating the anti-trust laws."

The Federal Trade Commission Act, section 5, provides:

> "That unfair methods of competition in commerce are hereby declared unlawful."

Unfair methods of competion at common law included fraudulent, dishonest and culpable acts involving moral turpitude such as[17] violations of trade-mark rights, inducing breach of competitor's contracts, enticing employees from the service of competitors, betrayal of trade secrets, betrayal of confidential information, defamation of competitors and disparagement of competitor's goods, misrepresentation by means other than words, misuse of testimonials, intimidation of competitor's customers, combinations to cut off a competitor's supplies or to destroy his market, intimidation, obstruction and molestation of a competitor or his customers, bribery of employees, competing with purchaser after the sale of business and good will, and passing off the goods of one manufacturer or dealer as those of another.

The Supreme Court in the Gratz case[18] gave this definition:

> "The words 'unfair methods of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the comission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

It is not unlawful for a seller to select his customers.[19] In the Beech-Nut case,[20] after discussing cases referred to in note 19, supra, it was said:

> "By these decisions it is settled that, in prosecutions under the Sherman Act, a trader is not guilty of violating its

(15) United States v. Railway Employes' Dejt. of Am. Fed. of Labor, 283 Fed. 479.

(16) United States v. Swift & Co. et al., Equity Docket 37623 in the Supreme Court of the District of Columbia. Consent decree signed by Mr. Chief Justice Walter I. McCoy, February 27, 1920. Later Mr. Justice Hoehling permitted the American (formerly Southern) Wholesale Grocers' Association to intervene in support of the decree. On motion to strike this intervention Mr. Justice Stafford sustained the propriety and right of the intervention. Subsequently Mr. Justice Bailey denied the application of the California Co-operative Canneries to intervene to set aside the decree. For further history of this interesting proceeding, see Packers' Consent Decree, Hearings on Senate Resolution No. 211, Washington Government Printing Office. 1922.

(17) See for an interesting and valuable discussion: Memorandum on Unfair Competition at the Common Law, printed for use of Federal Trade Commission 1916, Government Printing Office.

(18) Federal Trade Com. v. Gratz, 253 U. S. 421, 427, 64 L. Ed. 993, 40 Sup. Ct. 572.

(19) United States v. Colgate & Co., 250 U. S. 300, 63 L. Ed. 992, 7 A. L. R. 443, 39 Sup. Ct. 465. See also Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. Ed. 892, 41 Sup. Ct. 451, and United States v. Schrader, 252 U. S. 85, 64 L. Ed. 471, 40 Sup. Ct. 251.

(20) Federal Trade Com. v. Beech-Nut Packing Co., 257 U. S 441, 66 L. Ed. ——, 42 Sup. Ct. ——.

terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."

This right to refuse to sell was made of difficult enjoyment by the further holding that some necessary acts to protect the right could be prevented by the Trade Commission.

The Federal Trade Commission claims, as illustrated, by its orders, the right to establish such principles of business ethics as its judgment approves. A proper code of ethics is desirable, but the determination of such a code is a moral and not a justifiable question. Besides it is impossible to detail all acts that are fair and unfair, and where law seeks to control there should be some degree of certainty. The proposals of statutes and administrative bodies leave business in a fog—likely at any time innocently and unconsciously to stumble against a "cease and desist" order. Washington has become the Mecca to which business turns its face and before which it sacrifices its individuality.

Perhaps these cease and desist orders and the continual meddling of the laws are more annoying than harmful, but greater freedom to business would, in my opinion, mean less waste and greater efficiency.

A large aggregation of capital can so conduct its business as to be within the law and at the same time accomplish results which are denied an equal amount of capital when distributed among many owners. To protect themselves and to enjoy the necessary freedom to contract, small businesses need to co-operate for the doing of those things which big business does with impunity.

Labor, agriculture, transportation and exportation have their special statutory exemptions from the restraints of the anti-trust laws. As to labor this exemption means practically little, if anything. Small businesses should be unshackled so that they may cooperate so far as to give them equal opportunity in competition with big business. Some restraining laws are necessary, some good has been accomplished and some harm done by the anti-trust laws, but experience has demonstrated the need for amendments.

Mr. Herbert Hoover, in his 1922 reports as Secretary of Commerce, discusses the history of what he calls The Restraint of Trade Acts, and with an understanding of economic questions possessed by few men, says:

"No one would contend that there be relaxation in the restraints against undue capital combinations, monopoly, price fixing, domination, unfair practices and the whole category of collective action damaging to public interest. There has been, however, a profound growth of understanding of the need and possibilities of co-operative action in business that is in the interest of public welfare. Some parts of these co-operative efforts are inhibited by law today, but of much wider result, many are stifled out of fear or shackled from uncertainty of the law. * * * Co-operative action has, however, struggled for development through the growth of chambers of commerce, trade associations, and conferences of one kind and another in an effort to meet various sorts of crises, to improve business standards, and to eliminate waste in production and distribution."

This profound scholar and wise statesman then makes suggestions "for the law to be liberalized," and concludes:

"All who know the situation in such matters will realize that the problems of co-operative action are mainly the concern of the smaller businesses. Such a measure as that suggested above would serve actually to protect small business

and thus to maintain competition. Big business takes care of itself. Legitimate trade associations and other forms of business co-operation would be greatly stimulated along lines of public welfare if such a plan were adopted.

"It apears to me that the time has come when we should take cognizance of these necessities if we are to have a progressive economic system. Its growing complexity, its shift of objective and service, require a determination based upon a proper sense of maintenance of long-view competition, initiative, business stability, and public interest."

BILLS AND NOTES—CHECK OVERDUE

MERRILL TRUST CO. v. BROWN

119 Atl. 109

(Supreme Judicial Court of Maine
Dec. 18, 1922)

Holder of check regular and complete on its face, who became the holder thereof not later than the day following its date, became the "holder before it was overdue," within Laws 1917, c. 257, § 185, defining a "check" as a bill of exchange drawn on a bank payable on demand, and requiring a holder in due course to have become the holder before it was overdue.

Louis C. Stearns, of Bangor, for plaintiff.

Gray & Sawyer, of Milbridge, for defendant.

PHILBROOK, J. This is an action brought by a special indorsee against the maker of a check; the trust company upon which it was drawn having refused to honor the same. The instrument bears date of May 16, 1921, the amount is $1,500, it is drawn upon the Union Trust Company, hereinafter designated the Ellsworth Bank, directs that bank to pay the sum for which it is drawn to the order of Harold A. Brown, and by the latter specially indorsed to the plaintiff in these words: "Pay to the order of Merrill Trust Co."

The defendant pleaded the general issue, and for brief statements of special matter of defense, to be used under the general issue pleaded, declared that the check, upon which said suit is founded, was obtained from the defendant by misrepresentation and fraud of one Harold A. Brown, the payee named in said check, who transferred the same to the plaintiff, and that the defendant received no consideration therefor. He further declared that the plaintiff did not pay any money for said check, nor pay nor part with any consideration therefor, and has not sustained nor suffered any loss or damage on account of said check, and is not an innocent holder for value.

(1) The case is before us on report. The execution and indorsement of the check is not contested. Inspection of the instrument shows that it is complete and regular upon its face. The plaintiff became the holder of it not later than the day following its date. In Asbury v. Taube, 151 Ky. 142, 151 S. W. 372, it was held that title to a check was acquired by an indorsee before it was overdue when it was regular on its face, payable on demand, and was negotiated within two days after it was drawn. Under this rule we must find that the plaintiff, in the case at bar, became the holder of the check before it was overdue.

Under the provisions of chapter 257, § 185, P. L. 1917, known as the Uniform Negotiable Instruments Act, a check is defined as a bill of exchange drawn on a bank, payable on demand, and, except as therein otherwise provided, the provisions of the act applicable to a bill of exchange, payable on demand, apply to a check. After declaring that the holder of a negotiable instrument in due course may sue thereon in his own name, the act further provides (section 52) that a holder in due course is one who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact.

3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

We have already seen that the check was complete and regular upon its face, and that the plaintiff became the holder of it before it was overdue. The record also establishes the fact that it had not been dishonored before it was thus taken by the plaintiff in the regular course of its banking business. At the time when the plaintiff took the check, and gave credit to Harold A. Brown for the amount thereof, the latter was indebted to the plaintiff by reason of his overdraft. Section 25 of the Uniform Negotiable Instruments Act provides that an antecedent or pre-existing debt constitutes value; hence the check in suit, which

was taken and credited to Harold A. Brown's account, thereby diminishing the amount of the overdraft, was taken for value. Was the check taken in good faith? In Atlas National Bank v. Holm, 71 Fed. 489, 19 C. C. A. 94, it was held that one who takes an assignment of commercial paper before maturity, paying value, without notice of infirmity in title or consideration, is deemed purchaser in good faith. Was the check taken without knowledge on the part of the plaintiff as to infirmity, fraud, or irregularity between the original parties? Conceding, for the sake of argument, that it is a fraud on the part of a drawer to draw a check upon a bank where there are no funds to meet it (E. & T. Banking Co. v. Cunningham, 103 Me. 455, 70 Atl. 17), yet the actual knowledge by the plaintiff necessary to defeat the action is so fully and forcibly discussed in Mechanics' Savings Bank v. Berry, 119 Me. 404, 111 Atl. 533, that reference thereto, together with interpretation of the testimony most favorable to the defendant, makes plain the plaintiff's claim that it took the check without actual knowledge of the previous infirmity, fraud, or irregularity.

(2) Finally, the defendant claims that the check in suit was given without consideration. The defendant, who drew the check, and Harold A. Brown, the payee therein named, are brothers. Harold is a horse dealer, who had received a carload of horses upon which he owed the sum of $1,487. According to the testimony of the defendant he was told by Harold that he (Harold) had an amount of money in the City National Bank at Belfast, but did not want the plaintiff bank to know that fact, that Harold requested the defendant to draw the check, which is the basis of this suit, on the Ellsworth bank, and offered to draw his (Harold's) check for a like amount, in favor of the defendant, on the Belfast bank. At that time the defendant said:

> "Harold, of course you know that I haven't got $1,500 in the bank" (meaning the Ellsworth bank).

To which Harold replied:

> "Why, certainly, but this is all right. Now you give me your check, and I will give you mine and everything will be all right, because I don't want the Merrill Trust (the plaintiff) to know I have this deposit down in the City National Bank at Belfast."

The check in suit was accordingly drawn, and in exchange therefor Harold drew his check on the Belfast bank, bearing the same date and for the same amount as that named in the check which he received from the defendant, and made payable to the order of the latter. The defendant also testified that he had thus accommodated his brother on other occasions and such transaction "went all fine," saying, among other things:

> "I swapped checks with him for $500 about four months previous to that."

(3, 4) The law is well settled that cross notes, bills, or checks, though made for the accommodation of the parties, are not accommodation, but business, paper, provided there is no restriction on use or negotiation; the one note, bill, or check being a good consideration for the other received in exchange. Moreover, the transaction being complete at the time of the exchange, the question of original consideration is not affected by subsequent events, such as a failure of one of the parties to pay his note when due. American National Bank v. Patterson, 145 La. 995, 83 South. 218, 7 A. L. R. 1563, and annotations, pp. 1569-1571. See, also, Dockray v. Dunn, 37 Me. 442.

We hold that judgment must be rendered for the plaintiff and, under section 57 of the Uniform Negotiable Instruments Act, it may recover for the full amount of the check.

Judgment for plaintiff for $1,500 and interest thereon from date of the writ.

NOTE—*When a Check is Overdue.*—It is impossible to state the precise period of time at which a check may be said to be overdue. The conclusion in each case is determined by due consideration of the special circumstances surrounding the parties. The retention of a check by the holder for a considerable time, without presentment, where no defense exists against it, is unusual, and this circumstance is sufficient to put a party taking it upon inquiry, and a check dated several months before its transfer, and which might have been presented at or soon after its date will, in the absence of explanation, be treated as overdue and dishonored, whether it has been actually presented or not, so as to let in defenses existing between the drawer and payee. 5 R. C. L. 537; Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70.

In the light of some circumstances, a check is overdue when there was a delay in presentment of two and a half years, Skillman v. Titus, 32 N. J. L. 96; one year, Lancaster Bank v. Woodward, 18 Pa. 357; fourteen months, Cowing v. Altman, 71 N. Y. 436; five months, First Nat. Bank v. Needham, 29 Ia. 249; five days, Down v. Halling, 4 Barn. & C. 330, 6 Dow. & R. 445, 2 Car. & P. 11.

It has been held that a check is not overdue, and may still be negotiated free from equitable defenses where there has been a delay of one month, Lester v. Given, 8 Bush 357; ten days, Ames v. Meriam, 98 Mass. 294; eight days, London & County Bkg. Co. v. Groome, L. R. 8 Q. B. Div. 288; six days, Rothschild v. Corney, 9 Barn. & C. 388; four days, First Nat. Bank v. Harris, 108 Mass. 514; one day, Himmelmann v. Hotaling, 40 Cal. 111.

That a check was received three days after its date was held insufficient to put the purchaser on inquiry. Labor v. Steppacher, 103 Pa. 81.

A check made in St. Paul and cashed at Denver five days later, was held not, for this reason, to put the holder on his guard. Estes v. Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424.

A check made September 29, was dated September 22. On September 26, the drawer had made an assignment for his creditors. It was held that the bank, knowing of the assignment, was put on inquiry, although it did not know that the check had been dated back. Chaffee v. First Nat. Bank, 40 Ohio St. 1.

The transfer of a post-dated check before the day of its date was held no cause of suspicion, so as to put the holder on inquiry as to any equities existing against his right to recover. Mayer v. Mode, 14 Hun (N. Y.) 155; Albert v. Hoffman, 64 Misc. 87, 117 N. Y. Supp. 1043; Walker v. Geisse, 4 Whart. 252, 33 Am. Dec. 60.

BOOK REVIEWS

VAN AUKEN ACCIDENT AND HEALTH INSURANCE LAW

Among the recent legal publications is a book entitled, "Ready Reference Digest of Accident and Health Insurance Law," by Myron W. Van Auken, published by Matthew Bender & Company, Albany, New York, 1922.

The author, who is a member of the Utica, New York Bar, has been identified with the accident insurance field for many years, holding the position of General Counsel of the Commercial Travelers' Mutual Accident Association of America. He has compiled a digest of cases in which rights under accident insurance policies formed the subject matter of the contests. This digest has been arranged and printed in book form and brought down to date. It covers generally the entire field of the adjudicated cases in which the courts have construed the word "accident" and distinguished the same from "disease."

It is manifestly the work of years of research and careful analysis such as only an experienced trial lawyer could prepare.

The value of the book has been greatly increased by a common sense index so that a layman, unfamiliar with legal phraseology and the manner in which lawyers classify different matters, can readily find some reported decision either identical with his or bearing such close resemblance as to afford him the benefit of the principles which would apply in his case. The work should be invaluable to any practicing lawyer handling cases involving the construction of accident policies and of great interest to any lawyer or layman interested in insurance work generally.

The book is bound in buchram, is of convenient size, clear, legible type and well arranged with an introduction by William Brosmith, General Counsel and Vice-President of the Travelers' Insurance Company, Hartford, Connecticut.

RAILROADS: RATES—SERVICE —MANAGEMENT

The book, entitled as above, is by Homer Bews Vanderblue, Ph. D., professor of business economics, Harvard University, sometime professor of transportation, Northwestern University, and Kenneth Farwell Burgess, LL. B., of the Chicago Bar, general attorney, Chicago, Burlington & Quincy Railroad Company. The authors have produced a work which they say is neither a law book nor a mere text on economics, but rather a volume presenting thoughtful observations resulting from joint experience in teaching the subject in a university school of commerce and in active practice before courts and commissions. A happy combination.

The original Act to Regulate Commerce was passed in 1887. Its primary purpose was to regulate rates, and prevent extortion and discrimination. It was a rate making and rate control statute. This law has been added to by three amendments, the last of which was the Transportation Act of 1920. From a meager commencement in 1887, Congress has extended the scope of regulation until it includes practically the entire management and control of railroad construction, rates and operation, necessitated by prior wrongful management and operation.

It is the present law and present system of regulation that this book treats. The book combines the two essentials to a proper study of the general subject, viz., law and economics. It deals first with the history of railroad regulation in this country and with the agencies of regulation, and the relation of Commissions and Courts. The subjects of Rates, Service, and Management follow in order, and include the proper sub-divisions of each. For instance, the last mentioned title includes such subjects as Rehabilitation of Credit, Valuation, Protection of Investors, Adjustment of Labor Disputes, Integrity of Accounts, and Consolidation.

It is a very helpful book, essential, one might say, to the student and practitioner alike. To mention the names of the authors, is to recommend the book as a thorough and scholarly work.

The book has 480 pages, and is published by The MacMillan Company.

SCHOULER ON WILLS, EXECUTORS AND ADMINISTRATORS

The work of Professor Schouler on the subject of Wills, Executors and Administrators is so well known by the profession that little need be said about this, the sixth edition. This edition is by Arthur W. Blakemore, of the Boston Bar. Mr. Blakemore is the author of "Wills" in Cyc, the editor of the sixth edition of Schouler on Marriage, Divorce, Separation and Domestic Relations, etc. The profession is well acquainted with the excellent character of his work.

The growth of the subject has necessitated the addition of many new chapters. Thus, the construction of Wills has been made a special feature by the introduction of thirty-one new chapters containing all the modern cases, and the law of Estates has also been newly written with sixteen new chapters containing, among other interesting features, a full exposition of recent developments in the law of conditions and restraints on alienation.

The subject of Executors and Administrators has been brought down to date, and includes new chapters on the Rights of Beneficiaries, and a full modern treatment of the Ademption, Lapse, and Abatement of Legacies, and kindred topics.

A comparison of this (the 6th) edition with the fifth discloses that the fifth division cited 14,000 cases, while this edition cites 31,000. On the subject of Construction of Wills the fifth edition contained one chapter of 160 pages, while the new edition devotes 31 chapters, covering 440 pages to the subject. To Estates, Conditions and Trusts, the fifth edition devoted one chapter, of 56 pages, called Miscellaneous Provisions. The sixth edition gives to this subject 16 chapters, of 210 pages.

Relative to the treatment of the subject of Testamentary Capacity, the author says:

> "Medical knowledge of mental diseases has so far advanced since Professor Schouler wrote his treatise that an entire recasting of the portion of the work on Testamentary Capacity has been necessary, and the editor of this edition has brought the work completely in line with modern psychiatric developments through the courtesy of Dr. Thomas A. White of the Government Hospital at Washington, one of the recognized leaders in advanced study of diseases of the brain. Full directions for examination and cross-examination of witnesses and preparation of such cases for trial in the light of modern medical knowledge have also been inserted in this edition."

The work is up to the standard set by Professor Schouler. It is published by Matthew Bender & Co., Albany, N. Y., and is in four volumes.

CORRESPONDENCE

Cambridge, Mass.
May 15th, 1923.

Thomas W. Shelton, Esq.
Bank of Commerce Building,
Norfolk, Va.

Dear Shelton:

I have just read your article entitled "Hobbled Justice" in Central Law Journal for April 20. This is something at which every one who has the administration of justice at heart must rejoice. You certainly could not have made the point better. Res ipsa loquitur.

Yours very truly,

ROSCOE POUND.

ITEM OF PROFESSIONAL INTEREST

WOMEN JURORS WHO REFUSE TO RETIRE

An extraordinary contention was incidentally raised before the Court of Appeal in Nelson v. Moir, Times, 17th February. Here an action had been tried before Mr. Justice McCardie in which questions of grossly indecent conduct arose, and two women jurors had refused to retire from the jury box when invited by the judge to do so. The plaintiff obtained a verdict for slander and £500 damages, and the defendant now asked for a new trial. One of the contentions of counsel, not very clearly expressed in the reports, would appear to have been that the judge, in the exercise of his statutory discretion, should have decided that in this class of case justice would not be done if a woman were on the jury, and should have withdrawn the juror to substitute a new juror, on the refusal of the women to retire. Clearly such an exercise of his discretion would have been possible for the learned judge, since the statute gives him the right of deciding that any case is unsuitable for a feminine jury; but it is idle to contend that he was bound to exercise it. The Court of Appeal felt it necessary to emphasize their view that the sex of members of the jury is not a matter on which, in any normal circumstances, counsel is entitled to place reliance on an appeal.—Solicitors' Journal (Eng.), March 3, 1923.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles** — Crossings. — An automobilist, traveling eastward at least 25 miles per hour when he struck another car traveling westward at about 12 miles per hour within a few feet of the north side of the road, held negligent as a matter of law.—Zietlow v. Sweger, Wis., 192 N. W. 47.

2.——License.—Laws 1921, p. 338, § 2, prohibiting the operation of motor vehicles for transportation of persons or property for compensation on public highways, as defined by section 1, subd. (e), except in accordance with the provisions of the act, section 4 of which prohibits such transportation "between fixed termini or over a regular route," as defined by section 1, subd. (f), without a certificate of public necessity, read in the light of Laws 1921, p. 251, relating generally to the licensing of motor vehicles for use on highways, and which was not repealed by the later act, as indicated by section 11 thereof, does not prohibit the hauling of goods for compensation by vehicles not regularly operated between fixed termini or over regular routes, though section 1, subd. (d), excepts taxicabs, which are usually not operated over regular routes.—Carlsen v. Cooney, Wash., 212 Pac. 575.

3. **Bankruptcy**—Appeal.—The issue of allowing or rejecting a claim of lien on the bankrupt's property is not reviewable by a petition to superintend and revise, but only by appeal.—Bear v. Liberty Nat. Bank of Roanoke, Va., U. S. C. C. A., 285 Fed. 706.

4.——Claims.—The confirmation of a composition with creditors by an alleged bankrupt does not deprive the court, or its referee, of jurisdiction to determine a claim by a third party to property which was then in the actual possession of the court through its receiver in bankruptcy, since the court will not take the affirmative action of returning the property without ascertaining the right of the alleged bankrupt to the property, though, if it was not in the actual possession of the court, so as to require the affirmative act of returning it, the court would have no jurisdiction to determine the claim.—In Re Kalnitzsky Bros. & Oppenheim, U. S. D. C., 285 Fed. 649.

5.——Discharge.—Confirmation of composition in voluntary proceedings is a discharge granted in voluntary proceedings, which bars a second discharge within six years under Bankrutcy Act, § 14b(5), being Comp. St. § 9598.—In Re Massell, U. S. D. C., 285 Fed. 577.

6.——Exemptions.—Under Const. Tex. 1876, art. 16, § 51, exempting a homestead in a city, town, or village "provided the same shall be used for the purposes of a home or as a place to exercise the business or calling of the head of the family," a bankrupt cannot hold as exempt the property used as his home and also the property in which he conducts his business in a distant town.—Robinson v. Elkel, U. S. C. C. A., 285 Fed. 733.

7.——Mortgage.—The rights of a mortgagee of an automobile whose mortgage was not acknowledged nor recorded until after bankruptcy of mortgagor, under the statutes of Florida (Rev. Gen. St. 1920, § 3838), which provide that, where mortgagor retains possession, a chattel mortgage must be recorded to be good as against creditors or subsequent purchasers, held inferior to those of the trustee, who has the rights of a judgment creditor, under Bankruptcy Act, § 47a (Comp. St. § 9631a).—In Re Redding, U. S. D. C., 285 Fed. 575.

8.——Partners.—Under Bankruptcy Act, § 5, subsec. (c) to (g) being Comp. St. § 9589, contemplating the administration of both partnership and individual estates, except as provided in subsection (h), in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, and in view of the impossibility of the firm bei..g bankrupt while one or more of the partners is solvent, since the partners are each individually liable for the firm debts, an adjudication of bankruptcy against a partnership is an adjudication against each of the partners.—Bear v. Liberty Nat. Bank, U. S. C. C. A., 285 Fed. 703.

9.——Power of Attorney.—One acting for bankrupt under a general power of attorney with respect to real estate owned by bankrupt in Louisiana, consisting of farms and a hotel and furniture, in possession of a tenant, is not within Rev. Civ. Code La. art. 3252, giving a privilege to salaries of "secretaries, clerks, and other agents of that kind," nor is the property of bankrupt "in his hands" in such sense that he may retain it to satisfy an indebtedness to him under article 3023 of such Code.—Wisong v. Clarke, U. S. C. C. A., 285 Fed. 726.

10.——Preferences.—Commencement of suit of a trustee to set aside a mortgage as a fraudulent preference cannot be considered as the filing of a claim by the creditor which may be amended, after expiration of the year for presenting claims, to set up the claim as an unsecured debt, after final judgment setting aside the mortgage.—In Re Baker's Baking Co., U. S. D. C., 285 Fed. 652.

11.——Refund.—Where buyers of intoxicating liquor, which was sold to them as tax-free, were compelled to pay the so-called floor tax under the proviso of War Revenue Act Oct. 3, 1917, § 303 (Comp. St. 1918, § 5986b), that such tax on distilled spirits in the custody of a bankruptcy court should be paid by the person to whom the spirits were delivered, they could in equity require the trustees to refund them the amount they were compelled to pay.—Heyman v. United States, U. S. C. C. A., 285 Fed. 685.

12. **Banks and Banking**—Adverse Interest.—Where cashier was the sole representative of his bank in taking notes to make good the amount of his misappropriation of the bank's funds, his knowledge of the fact that the payee and indorser had intrusted such notes to him for the purpose of securing a loan from a third party to such payee and indorser was imputable to the bank, notwithstanding the cashier's adverse interest.—Mays v. First State Bank, Tex., 247 S. W. 845.

13.——Preferred Claims.—As a claim for damages for failure to deliver stocks sold by a bank while in control of the bank examiner could not be considered as expenses incurred in liquidating an insolvent estate, it was not a preferred claim.—A. M. Law & Co. v. Farmers' & Merchants' Bank, S. C., 115 S. E., 812.

14.——Priorities.—Where county officers deposit the money of the county in a bank which has not qualified as the county depository, and this bank, in accordance with an agreement with another bank, deposits part of the county money in the second bank and takes certificates of deposit therefor in its (the bank's) name as between the two banks, the relation of bank and ordinary depositor exists, and the first bank is not entitled to priority of payment under section 2823, Hemingway's Code (Code 1906, § 3485) out of the assets of the second bank, which is being liquidated by the state banking department.—Wardlaw v. Planters' Bank, Miss., 95 So. 135.

15.——State Lien.—Under Rev. Laws Okla. 1910, §§ 302, 303, providing for the payment of depositors of banks or trust companies taken over by the bank commissioner, and for a lien in favor of the state for the benefit of the depositor's guaranty fund on the assets of the bank or trust company, the state has no lien on the assets before the taking of possession by the bank commissioner.—United States v. State of Oklahoma, U. S. S. C., 43 Sup. Ct., 295.

16. **Bills and Notes.**—Collateral.—When the maker of a note receives no consideration, the payee suffers no detriment, and the note is given to cover up shortage of the cashier of the payee bank, and the cashier is not released in any wise from any part of his debt due the bank by reason of his having misappropriated its funds, the note is merely collateral.—First Nat. Bank v. Allen, Okla., 212 Pac. 597.

17. **Carriers of Goods.**—Amount of Damages.—Where a shipper of diamonds by express without the state informed the carrier's agent that the package was valuable, but declared no value in writing, and the receipt therefor did not do so, or limit liability pursuant to the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) and the rules of the Interstate Commerce Commission, the shipper was properly allowed to recover full value for his loss.—Kristianson v. American Ry. Express Co., S. C., 115 S. E. 899.

18. **Carriers of Passengers**—Accounts.—Where the street railway company's balance sheets and income account showing its net earnings are made part of the application to the Commission, all the items entering into the accounts may be considered, and the nature of all expenditures which go to reduce the net earnings are subject to investigation. But when the company stipulates that certain expenditures are not to be considered as affecting the value of its property or as having any bearing on the rates of fare it may charge, an investigation of such expenditures is no longer material, and may not be required.—State v. Minneapolis Street Ry. Co., Minn., 191 N. W. 1004.

19.——Bus Drivers.—A bus driver is a common carrier required to exercise the utmost care and diligence for the safety of his passengers, and the jury may find that he is thereby required while driving along a street car track to look behind at intervals to ascertain whether a street car is approaching.—Simmons v. Pacific Electric Ry. Co., Calif., 212 Pac. 637.

20.——Connecting Lines.—A passenger, without knowledge of a condition printed on her ticket, which she did not sign, limiting the railroad's liability for safe carriage to its own lines, held not precluded from recovering for an assault and battery committed by the auditor of a connecting road covered by the ticket.—Missouri Pac. R. Co. v. Prude, Ark., 247 S. W. 785.

21.——Negligence.—Where a passenger was killed on a dark night, when he alighted on a bridge and fell into a river because the brakeman, in calling his station, led him to believe the train was there, whereas it stopped at a water tank, the carrier must be held negligent.—Larson v. Green Bay & W. R. Co., Wis., 192 N. W. 63.

22.——Recovery.—Where a collision between a motor bus and an interurban car was caused by the concurrent negligence of the operator of the bus and the street car company, a passenger of the bus can recover from either or both defendants.—Simmons v. Pacific Electric Ry. Co., Calif., 212 Pac. 641.

22.——Reasonable Care.—Passengers are not under all circumstances obliged to stop, look and listen before crossing tracks at a railroad station in boarding or leaving trains, but the rule does not relieve them from the duty to exercise reasonable care for their own safety.—Dahl v. Pennsylvania R. Co., Pa., 119 Atl. 656.

24. **Civil Rights**—Restaurants.—A restaurant or lunchroom is not an "inn, hotel or boarding house" within the meaning of those words in a civil rights act, forbidding racial discrimination by those in charge thereof.—State v. Brown, Kan., 212 Pac. 663.

25. **Commerce**—License.—Where plaintiff's agent in Minnesota, soliciting an order for a meat slicer from defendant in Wisconsin, brought the machine to defendant's shop the following day for demonstration and sold it to defendant, the transaction was one in "interstate commerce," and plaintiff corporation could recover without complying with St. 1921, § 1770b, requiring foreign corporations to be licensed to do business within Wisconsin.—American Slicing Mach. Co. v. Jaworski, Wis., 192 N. W. 50.

26.——Rates.—An order of the Interstate Commerce Commission, fixing rates or apportioning joint rates between carriers, if unsupported by evidence, is invalid.—Akron, C. & Y. Ry. Co. v. United States, U. S. S. C., 43 Sup. Ct. 270.

27——Stolen Automobiles.—The driving of a stolen automobile from one state to another under its own power is "interstate comerce," even though no goods or passengers were transported therein for hire.—Whitaker v. Hitt, U. S. C. C. A., 285 Fed. 797.

28. **Constitutional Law.**—Decisions.—The Constitution affords no protection as against impairment of a contract by judicial decision.—Columbia Ry., Gas & Electric Co. v. State of South Carolina, U. S. S. C., 43 Sup. Ct., 306.

29.——Due Process of Law.—An assessment of $102,942.30 against a street railway for paving between, and for 18 inches outside, its tracks, as authorized by Pub. Laws N. C. 1915, c. 56, on failure of the company to make the improvement, was not arbitrary or wholly unreasonable, so as to constitute a taking of property without due process of law or a denial of the equal protection of the laws, in violation of the Fourteenth Amendment, though the company's property on the street had a value of only $100,000, while abuttng property, against which an assessment of $89,909.55 was made on a front-foot basis, had an assessed value of $5,083,250, and though the company was put to an expense of $75,108.85 in taking up and relaying its track, and though its railway was being operated at a loss.—Durham Public Service Co. v. City of Durham, U. S. S. C., 43 Sup. Ct. 290.

30.——Property Rights.—Denial of right to repair, so as to keep fit for use, a building lawfully erected, so that the owners have a vested property right in it, is a denial of the enjoyment of the property right.—Crossman v. City of Galveston, Tex., 247 S. W. 810.

31. **Corporations**—Dividends.—Complainant loaned 60 shares of stock to his brother, a shareholder and officer of defendant corporation, and the borrower wrongfully surrendered the shares, had them reissued to himself, and they were thereafter sold at public sale to pay his indebtedness to the company and by the company bought in and held as treasury stock. Held that, in a suit to recover the stock and dividends thereon, there was no basis for a decree for dividends in an amount equal to dividends paid other shareholders, in the absence of allegations and proof that the corporation had sufficient assets over and above its liabilities and stock to pay such dividends, because, if the shares originally owned by complainant were entitled to share in dividends, such share would be in the dividend declared and distributed.—Mobile Towing & Wrecking Co. v. Hartwell, Ala., 95 So. 191.

32.——Equity.—A suit in equity is the surest, most complete, and most just remedy for compelling a corporation to register a transfer of stock, and to adjust various conflicting rights of other parties—Howe v. Roberts, Ala., 95 So. 344.

33.——Service.—A New Orleans bank, whose New York correspondents transacted an extensive business for it, but which had no place of business in New York, and none of whose officers or employees resided there, was not "doing business" in New York, so as to warrant the inference that it was present there, and support service of process made on its president while temporarily in New York.—Bank of America v. Whitney Cent. Nat. Bank, U. S. S. C., 43 Sup. Ct. 311.

34 **Covenants**—School Purposes.—A restriction in a deed against the use of the property for other than enumerated purposes will not be enforced to prevent the use thereof for public or private school

purposes.—Clifton George Co. v. Great Southern Life Ins. Co., Tex., 247 S. W. 912.

35. **Executors and Administrators**—Notes.—A note given by a husband to his wife as an attempt to make a gift to her payable after the husband's death is a mere promise to give money at a future time, and cannot be enforced.—Latcham v. Latcham, Iowa, 191 N. W. 977.

36. **Explosives**—Gasoline.—The purpose of St. 1917, § 1421o, punishing the sale or keeping of gasoline in unmarked containers, being the protection of the public from improper practices, dangerous to life and property, it will be construed as imposing liability without requiring actual knowledge or intention, since to hold otherwise would defeat its purpose.—Knecht v. Kenyon, Wis., 192 N. W. 82.

37. **Highways**—Tractors.—A statement in the count of a declaration that defendant's overturned tractor was naturally calculated to frighten a mule of ordinary gentleness was a sufficient averment showing negligence in leaving the tractor in that position, since very general averments, little short of mere conclusions of a want of care, meet the requirements of the law.—Shelby Iron Co. v. Morrow, Ala., 95 So. 370.

38. **Insurance**—Agency.—Where the agent taking the application for insurance on sows for 80 per cent of the greatly inflated price at which they were sold at an ostensible sale was the agent of the parties to such sale and their banker, and handled their paper, and was clerk of the sale and familiar with the arrangement under which the purchaser was to have an indefinite time to pay and the proceeds of the insurance in case of loss were to be received in full settlement, and was the transferee of the purchase-money notes, and if any fraud was perpetrated, participated therein, the insurance company was not chargeable with his knowledge of the fraud.—Smith v. Iowa State Live Stock Ins. Co., Iowa, 191 N. W. 981.

39.——Direct Liability.—In view of St. 1921, § 1797—63, a policy issued to a motor vehicle carrier providing insurer would pay to "assured" the amount of any final judgment for damages rendered against "assured" for injury from negligent operation, but further providing that the coverage should be extended to cover in accord with a city ordinance and the state statutes, held not a contract of mere indemnity, but one of direct liability to a person so injured.—White v. Kane, Wis., 192 N. W. 57.

40.——Exemptions.—Provision of charter of benefit insurance association excluding liability for death while on duty as a "soldier" did not apply to one enlisted in the navy, especially where the hazardous occupation had nothing to do with his death.—Schroeder v. Amalgamated Ass'n, Etc., of America, La., 95 So. 189.

41.——Representations.—False answers in an application for insurance will not, under Rev. St. art. 4947, avoid the policy, unless the represented thing actually contributed to the contingency upon which the policy became due and payable.—Southern Surety Co. v. Butler, Tex., 247 S. W. 611.

42.——Representations.—Beneficiary of an industrial insurance policy cannot recover if the insured at the time of his application and issuance of the policy had tuberculosis, but misrepresented that fact in the application.—Isabell v. American Nat. Ins. Co., Mo., 247 S. W. 426.

43.——Service.—A Minnesota mutual insurance association was not doing business in Montana, so as to be suable there, merely because one or more members without authority to obligate it solicited new members, or because it insured lives of persons living in Montana, and mailed notices addressed to beneficiaries at their homes therein, and paid losses by checks from its home office.—Minnesota Commercial Men's Ass'n v. Benn, U. S. S. C., 43 Sup. Ct. 293.

44.——Warranties.—Warranties in fire insurance policies, requiring the insured to keep account books and inventories showing the value of the stock on hand, must be substantially complied with, but in determining what is required a fair and reasonable construction is to be adopted.—Home Ins. Co. v. F. C. Flewellen Produce Co., Tex., 247 S. W. 833.

45. **Intoxicating Liquors**—Search Warrants.—The provision of National Prohibition Act, tit. 2, § 25, that "no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house," cannot be extended by construction to authorize issuance of a search warrant on an affidavit showing probable cause to believe that liquor was being manufactured therein.—United States v. Jajeswiec, U. S. D. C., 285 Fed. 789.

46. **Landlord and Tenant**—Liability of Tenant.—A landlord who lets an entire building to one tenant, reserving only the right to enter to make repairs, is not liable to a traveler on an abutting public highway for injuries from ice or snow falling from the roof, where it does not appear that the tenant might not have prevented the accident by the use of reasonable care.—Meyers v. Pepperell Mfg. Co., Me., 119 Atl. 625.

47. **Livery Stable and Garage Keepers**—Breach of Obligation.—A breach by a public garage keeper of his agreement not to let any unauthorized person take plaintiff's automobile is itself a failure to exercise due care to keep the car safely.—Mehesy v. Mission Garage, Calif., 212 Pac. 643.

48. **Marriage**—Minor.—The fraudulent conduct of plainaiff husband in misrepresenting his age as being above 21 years does not estop him in proceedings to have a marriage annulled on the ground of his non-age.—Swenson v. Swenson, Wis., 192 N. W. 70.

49. **Master and Servant**—Agency.—In action for injury to one on a highway by a wagon, when plaintiff proves the wagon and team belonged to defendant, and that the driver had been a driver for defendant for several years prior to the injury, a presumption of law is raised that driver was defendant's employee at time of injury and acting in line of employment, and, if the presumption is not overcome by evidence, the plaintiff is entitled to recover.—Eetna Explosives Co. v. Schaeffer, Ala., 95 So. 351.

50. **Municipal Corporations**—Agency.—In action by widow to recover for her husband's death, in collision of his motorcycle with defendant's automobile truck, evidence as to the driver's employment by defendant, and defendant's name lettered on the side of the truck, held to be convincing proof of defendant's ownership, and chauffeur's agency for him.—Karte v. J. R. Brockman Mfg. Co., Mo., 247 S. W. 417.

51.——Nuisance.—An ordinance so far as it makes final the orders of its council declaring a building a nuisance, and ordering its summary abatement, is void.—City of Texarkana v. Reagan, Tex., 247 S. W. 816.

52.——Res Ipsa Loquitur.—Where an automobile standing at the curb was struck by a truck, the doctrine of res ipsa loquitur applies.—Rosenberg v. American Ry. Express Co., N. Y., 198 N. Y. S. 224.

53. **Railroads**—Contributory Negligence.—It is the duty of a guest riding in an automobile approaching a railroad track to use ordinary care for his own safety by looking and listening at a reasonable distance so that he can by ordinary care inform the driver in time to prevent a collision, and, if he saw or could have seen the train had he looked in time by the exercise of ordinary care to inform the driver of its approach, and thereby prevent collision, his failure so to do is contributory negligence precluding recovery.—Sorrell v. Payne, Mo., 247 S. W. 462.

54. **Release**—When Binding.—Where plaintiff understood and spoke English, and was able to read and write, and a release of a claim for personal injuries was not only read to him, but read by him, and a draft received in settlement was cashed by him some time after the accident and the proceeds never tendered back, the release held binding on him as against his claim that he did not understand that he was settling the claim for injuries.—Backhous v. Wagner, N. Y., 138 N. E. 82.

55. **Sales**—Acceptance.—Where goods were ordered, and they were shipped before the time

specified in the order, the buyer waived the objection that they were prematurely shipped by accepting them and, without objection, permitting them to remain in his storehouse until they were destroyed by fire six days later.—J. B. Camors & Co. v. Morlet, Miss., 95 So. 317.

56.——Notice.—In a suit by the purchaser against the seller, to recover the amount paid under the first contract, upon the ground that there has been a breach of warranty by the seller, where the evidence authorizes the inference that the seller has committed such a breach, and has waived his right to the written notice required by the contract, and there is no evidence demanding the inference that by the execution of the second contract the parties undertook to settle all prior differences between them, the plaintiff's right to recover is not barred as a matter of law by his failure to give the seller the required notice in writing, and it was therefore error to grant a nonsuit.—Smith v. Stevens, Ga., 116 S. E. 36.

57.——Provisons of Contract.—Where defendant buyer sought to avoid liability under a contract on the ground that its execution was induced by the false representations of plaintiff's agent, held that a provision of the contract that "there are no representations, guaranties, or warranties, except as may be written on the face hereof," was not binding on the defendant.—International Milling Co. v. Priem, Wis., 192 N. W. 68.

58.——Representations—Where contract to buy thresher and engine was signed by four buyers, false representations, inducing the signature of the buyer who first signed, were a defense to suit on the contract, where, although the representation was made after his signature was affixed, it was made at a time when the contract had not been so executed and delivered by all the buyers and accepted by the sellers as to be a binding obligation.—Zorns v. Brownfield Hardware Co., Tex., 247 S. W. 894.

59. **Street Railroads**—Right of Way.—A city ordinance, giving the right of way to police vehicles, requiring every vehicle to draw up as near the curb as possible, and a street car to stop upon the approach of any fire apparatus, gives a police automobile the right of way over a street car at a street intersection.—Nolan v. Kansas City Rys. Co., Mo., 247 S. W. 429.

60. **United States**—Contractors.—Where a company, operating its plant for waterproofing and fireproofing cloth wholly on cloth received from the government prior to the Armistice, had no other business on which it could continue after the government work ceased, and expended considerable sums in operating at a loss, to keep its business alive and its organization existent, such expenditures were not recoverable, under Act March 2, 1919 (Comp. St. Ann. Supp. 1919, §§ 3115 14/15a-3115 14/15e), since they were not expenditures, obligations or liabilities incurred in performing or preparing to perform the contract with the government, and they were not incurred prior to November 12, 1918.—Price Fire & Water Proofing Co. v. United States, U. S. S. C., 43 Sup. Ct. 299.

61. **Workmen's Compensation Act**—Agent of Public.—A town superintendent of highways is the agent of the public at large for the purpose of constructing, repairing and maintaining the highways of the town, and no relationship of employer and employee, principal and agent, or master and servant exists between him and the town, and, in the absence of such relation, he is not within the coverage of the Workmen's Compensation Law.—Youngman v. Town of Oneonta, N. Y., 198 N. Y. S. 217.

62.——Cause of Injury.—Where the accident is the immediate cause of death, it is immaterial under the Workmen's Compensation Act whether or not the employee be or be not peculiarly subject to have such accident befall him or to suffer therefrom more than another differently situated, the sole question being whether the accident was the immediate cause of the injury.—Hicks v. Meridian Lumber Co., La., 94 So. 903.

63.——Independent Contractor.—W. contracted with the county to haul gravel at an agreed price per cubic yard. Plaintiff agreed with W. to haul with W.'s team for half the earnings. The county paid W., who divided the amount with plaintiff. Held, that plaintiff was not an employee of the county within the meaning of the Workmen's Compensation Act.—Arterburn v. Redwood County, Minn., 191 N. W. 924.

64.——Minor.—An infant employed in violation of Acts 1911, c. 57, and Acts 1917, c. 77, is not bound by her election to claim compensation under the Workmen's Compensation Act, in view of her minority, and may bring an action at law for damages for injuries suffered, although a guardian was appointed for her under such act, and some payments were received by him.—Manning v. American Clothing Co., Tenn., 247 S. W. 103.

65.——Persons Excluded.—The provision of the Workmen's Compensation Act (Code Supp 1918, c. 15P [secs. 657-711]), excluding from its operation persons prohibited by law from being employed, means such persons as are by statute prohibited from being employed in a particular kind of service, and cannot be extended to include the minor son of one who has forbidden his employment in a particular capacity, when by the law of the land his employment in such capacity is not prohibited.—Byrd v. Sabine Collieries Corporation, W. Va., 114 S. E. 679.

66.——Total Disability.—Where an employee, aged 79, was suffering from an ununited fracture of the neck of the left femur in that part of the bone that forms the hip joint, causing a complete loss of the leg, which injury was permanent, but covered a wider area and extended beyond the leg proper to other parts of the body, rendering such parts useless, the injury was compensable under Workmen's Compensation Act, § 306, par. (a), being Pa. St. 1920, § 21993, providing for "total disability," paragraph (c) being section 21995, not covering injuries to other members of the body not therein mentioned, though produced by the same accident.—Rudisill's Trustee v. Wildasin, Pa., 119 Atl. 136.

67.——Total Disability.—An empolyee blind in one eye who suffers loss of the other eye as a result of injury in his employment is entitled to compensation under Workmen's Compensation Act, § 31 (d), for total disability subject to the reduction allowed by section 35 if the loss of the first eye occurred in the same employment, notwithstanding the provisions of section 33.—Calumet Foundry & Machine Co. v. Mroz, Ind., 137 N. E. 627.

68.—Within Scope of Employment.—Where a lumber company owned a whole town wherein the residences of its employees were separated from the boarding house, store, and main works by a railroad track, over which there was but one well-defined dirt road crossing, which was necessarily used by all employees in going to and coming from work, held that an injury to an employee at such crossing while returning to his work after his noonday meal, by a train not under the control of the company, occurred in the course of his employment, and had to do with and arose out of the business of the employer within the Workmen's Compensation Act.—Lumberman's Reciprocal Ass'n v. Behnken, Tex., 246 S. W. 72.

69.——Within Scope of Act.—Where a workman was a mere laborer employed as part of a logging outfit engaged in cutting down trees and sawing them into logs on the employer's timber holdings, and the employer required the workmen to cut their allotted strips clean and to cut the trees at a required distance from the ground and the logs into required lengths, and reserved the right to discharge workmen violating these requirements, and conducted a store, operated a commissary, and employed a physician, though workmen were not obliged to avail themselves thereof, the workman was a servant within the Workmen's Compensation Act, and not an independent contractor, though paid by the thousand feet, and though if workmen were lazy or failed to cut as many logs as the employer thought ought to be cut, they were not discharged, additional laborers being employed.—Dick v. Gravel Logging Co., La., 95 So. 99.